Office-Supreme Court, U.S.
FILED
JAN 4 1985
ALEXANDER L. STEVAS,
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No. 84-901

In the Supreme Court of the United States

October Term, 1984

AVCO FINANCIAL SERVICES, INC.,
Petitioner,

vs.

CLEVESTER DAVIS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether a person who actively promotes and substantially assists in the sale of a security may be liable under §12(2) of the Securities Act of 1933.

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STATUTORY PROVISION INVOLVED

An additional statutory provision involved necessary to address the petition for writ is §2(3), 15 U.S.C. §77b(3), of the Securities Act of 1933. It provides in pertinent part:

> (3) The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell," "offer for sale," or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.

SUMMARY OF ARGUMENT

1. Defendant Avco Financial Services, Inc. (AFS) and its branch manager, defendant Lee McCormick, actively participated in and promoted the Dare To Be Great (DTBG) securities. In the Toledo, Ohio area, they actively worked in concert with the DTBG representatives in selling securities. The Third Circuit's decision in *Collins v. Signetics Corp.*, 605 F.2d 110 (1979), expressly avoided the issue of whether under such facts §12(2) liability can be imposed. Thus, there is not a clear conflict between the Sixth Circuit's opinion in this case and the Third Circuit.

2. The plain language of §12(2) imposes liability on any person who "offers or sells" a security. Section 2(3), 15 U.S.C. §77b(3), defines "offer" to "include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." AFS's conduct in the promotion and sale of DTBG securities comes within this definition.

REASONS WHY THE PETITION FOR WRIT SHOULD BE DENIED

1. UNDER THE FACTS OF THIS CASE, THERE IS NOT A DIRECT AND IRRECONCILABLE CONFLICT BETWEEN THE SIXTH AND THIRD CIRCUITS.

At the trial of this class action, five of the plaintiff class members testified. Like each of the class members, they had executed promissory notes to AFS in return for loan proceeds used to purchase DTBG adventures. A unanimous court of appeals affirmed the district court's holding that the adventures sold were "securities" (App. 9a, 23a).[1] The court of appeals held that "[w]ith regard to the plaintiffs that testified, the evidence was more than sufficient to justify the finding that the [AFS] manager's activities were a substantial factor in their decisions to purchase DTBG securities" (App. 22a). The trial court had found that defendants gave "supportive and enthusiastic aid" to DTBG (App. 32a).[2] The appellate court "agree[d] with the trial court's findings of liability under §12(2) of the 1933 Act with regard to those class members who did testify that the representations of Avco's manager were the cause of their investing in DTBG . . ." (App. 21a).

The Sixth Circuit majority opinion concluded that AFS was liable as a "seller" under §12(2), 15 U.S.C. §77l(2),

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1. All references in this brief to the appendix are to the petitioner's appendix in its petition for writ, No. 84-901.

2. The court of appeals was "in total agreement" with the factual findings of the district court regarding the actions and intentions of AFS's manager (App. 7a).

of the Securities Act of 1933, where its activities were a substantial factor in an individual's decision to invest in DTBG (App. 21a-22a).

In *Collins v. Signetics Corp.*, 605 F.2d 110 (3rd Cir. 1979), the buyers failed to allege that there was any "special relationship" between the underwriters who actually sold the securities and the defendants in that suit. In the absence of that relationship, the Third Circuit held that the appeal must fail. 605 F.2d at 113. Under those facts, the court held that the buyers had no claim against the defendants under §12(2), because they had not purchased the securities from them. 605 F.2d at 114.

The Third Circuit in *Collins* expressly recognized that in a decision from the previous year, *Monsen v. Consolidated Dressed Beef Co., Inc.*, 579 F.2d 793 (3rd Cir.), *cert. denied*, 439 U.S. 930 (1978), it left open the issue of whether there can be aider-abettor liability under §12(2). The *Collins* court did not seek to address that issue since appellants' evidence did not support an aiding and abetting theory. *Collins, supra*, 605 F.2d at 113-14. In contrast, plaintiffs' evidence in this case fully supports such a theory.

In the present case, the court of appeals declined to "address the issue whether or not an aiding and abetting approach may ever be employed under §12(2)" (App. 14a, footnote omitted). Instead, it imposed §12(2) liability under the "proximate cause" theory. Nonetheless, the facts of this case fully support a finding of liability under §12(2) against AFS as an aider-abettor. The Third Circuit's holding in *Collins v. Signetics Corp., supra*, does not dictate otherwise. Accordingly, there is not a direct and irreconcilable conflict between the Sixth and Third Circuits.

2. THE LANGUAGE OF §12(2) FULLY SUPPORTS THE RESULT REACHED BY THE SIXTH CIRCUIT MAJORITY.

The court of appeals held that AFS was liable under §12(2). The court reached its holding by examining the statutory term "sells." It did not examine the statutory term "offers." That term provides an additional and independent basis for supporting the court's holding.

Section 12(2) encompasses any person who "offers or sells a security." The term "offer" includes "every attempt, or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value." 15 U.S.C. §77b(3). AFS's actions in promoting DTBG fall within that definition. AFS solicited investments in DTBG. As such, AFS comes within the plain language of §12(2). *See Lawler v. Gilliam,* 569 F.2d 1283 (4th Cir. 1978) (liability under §12(1), 15 U.S.C. §77l(1), which imposes liability on any person who "offers or sells" securities in violation of the registration provisions of the Act); *Katz v. Amos Treat & Co.,* 411 F.2d 1046, 1052-53 (2d Cir. 1969) (liability under §12(1)).

Both the petitioner and the Sixth Circuit addressed the issue of §12(2) liability from an unduly restrictive reading of the statute. The clear language of the statute imposes liability on one who "offers." *See* District Court Finding of Fact (App. 31a-33a). Neither the petitioner nor the Sixth Court examined that language, or the definition of it. This Court has "repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.' [citations omitted]." *Herman & MacLean v. Huddleston,* 459 U.S. 375, 386-7 (1983).

AFS's participation in the sale of DTBG securities fell well within the definition of one who "offers."

The Sixth Circuit's statement that "[i]f we are limited to a literal reading of the statute, it is obvious that the plaintiffs here must fail, because Avco was not in the literal sense the 'seller' of DTBG securities" (Pet's App. 12a) is incorrect. It overlooks the imposition of §12(2) liability on any person who "offers or sells a security." AFS's activities included attempts to dispose of DTBG securities. As such, it "offered" securities within the definition of §12(2). Thus, the Sixth Circuit's conclusion as to liability is fully consistent with the statutory language.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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